

1 ROBERT D. DENNISON, ESQ., CSB #127498
2 GARY L. GREEN, ESQ., CSB #82218
3 HARRIS, GREEN & DENNISON
4 5959 West Century Boulevard, Suite 1100
5 Los Angeles, California 90045
6 Telephone: (310) 665-8656 Facsimile: (310) 665-8659
7 Email: robertdennison@h-glaw.net
8 Email: garygreen@h-glaw.net
9

10 Attorneys for Defendant,
11 WESTCHESTER FIRE INSURANCE COMPANY
12

13 IN THE UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 LENSRAFTERS, INC.; and EYEXAM OF
17 CALIFORNIA, INC.,
18

19 Plaintiff,
20

21 vs.
22

23 LIBERTY MUTUAL FIRE INSURANCE
24 COMPANY; EXECUTIVE RISK SPECIALTY
25 INSURANCE COMPANY; UNITED STATES
26 FIRE INSURANCE COMPANY; MARKEL
27 AMERICAN INSURANCE COMPANY; and
28 WESTCHESTER FIRE INSURANCE
COMPANY,
Defendant

Defendant

MARKEL AMERICAN INSURANCE
COMPANY,

Cross-Complainant,
vs.

LENSRAFTERS, INC.; EYEXAM OF
CALIFORNIA, INC., LIBERTY MUTUAL
FIRE INSURANCE COMPANY;
EXECUTIVE RISK SPECIALTY
INSURANCE COMPANY; UNITED STATES
FIRE INSURANCE COMPANY; MARKEL
AMERICAN INSURANCE COMPANY; and

Case No.: C 07 2853 SBA

ANSWER OF WESTCHESTER FIRE
INSURANCE COMPANY TO CROSS-
COMPLAINT OF MARKEL AMERICAN
INSURANCE COMPANY

DEMAND FOR JURY TRIAL

1 WESTCHESTER FIRE INSURANCE
2 COMPANY,

3 Cross-Defendants

4 Defendant and Cross-Defendant Westchester Fire Insurance Company ("Westchester"), by
5 and through its counsel, answers the Cross-Complaint of Markel American Insurance Company
6 ("Markel") in this action, as follows:

7 1. Westchester admits the allegation in ¶1 of the Cross-Complaint.

8 2. Westchester denies the allegations in ¶ 2 of the Cross-Complaint.

9 3. Westchester admits, on information and belief, that Markel is an insurance company
10 organized under the laws of the State of Virginia. Westchester lacks sufficient information to admit
11 or deny the remaining allegations in ¶3 of the Cross-Complaint and therefore denies same.

12 4. Westchester admits, on information and belief, the allegations in ¶4 of the Cross-
13 Complaint.

14 5. Westchester admits, on information and belief, that plaintiff EyeExam of California,
15 Inc. is a California Corporation. Westchester lacks sufficient information to admit or deny the
16 remaining allegations in ¶5 of the Cross-Complaint and therefore denies same.

17 6. Westchester admits, on information and belief, that cross-defendant Liberty Mutual
18 Fire Insurance Company is an insurance company organized under the laws of the State of
19 Massachusetts. Westchester lacks sufficient information to admit or deny the remaining allegations
20 in ¶6 of the Cross-Complaint and therefore denies same.

21 7. Westchester states, on information and belief, that cross-defendant Executive Risk
22 Specialty Insurance Company ("ERSIC") is an insurance company organized under the laws of the
23 State of Connecticut. Westchester lacks sufficient information to admit or deny the remaining
24 allegations in ¶7 of the Cross-Complaint and therefore denies same.

25 8. Westchester admits, on information and belief, that cross-defendant U.S. Fire Ins.
26 Co. is an insurance company organized under the laws of the State of Delaware. Westchester lacks
27 sufficient information to admit or deny the remaining allegations in ¶8 of the Cross-Complaint and
28 therefore denies same.

1 9. Westchester admits that it is a New York corporation with its principal place of
2 business in Philadelphia, Pennsylvania, authorized to transact business as an insurer in the State of
3 California and other states. Except as admitted, Westchester denies each and every allegation in ¶9.

4 10. Westchester admits that this Court has jurisdiction over this action and Cross-Action
5 under 28 U.S.C. §§ 1332 and 2201. Westchester lacks sufficient information to admit or deny the
6 remaining allegations in ¶10 of the Cross-Complaint and therefore denies same.

7 11. Westchester admits on information and belief that the underlying Snow action is a
8 putative class action and that the allegations in the operative Complaint therein include allegations
9 that the defendants in that action violated the rights to privacy of the purported class members and
10 that such claims are said to be based on violations of the California Confidentiality of Medical
11 Information Act. On information and belief, Westchester denies the remaining allegations in ¶11.

12 12. Westchester admits, on information and belief, the allegations in ¶12.

13 13. Westchester admits that Markel American Insurance Company ("Markel") issued the
14 referenced commercial umbrella liability insurance policy for the stated policy period. Westchester
15 lacks sufficient information to admit or deny the remaining allegations in ¶13 of the Cross-
16 Complaint and therefore denies same.

17 14. Westchester admits, on information and belief, that Liberty Mutual issued annual
18 primary commercial general liability insurance coverage for each of the stated policy periods.
19 Westchester further admits on information and belief that plaintiffs are named insureds under such
20 primary general liability insurance coverage. Westchester also admits on information and belief
21 that each of the Liberty Mutual Policies has liability limits of \$3 million each occurrence and \$6
22 million in the aggregate per location. Except as admitted, Westchester denies each and every
23 allegation in ¶14.

24 15. Westchester admits, on information and belief, that ERSIC issued primary liability insurance
25 coverage during the stated policy period, covering both plaintiffs. Westchester further admits, on
26 information and belief, that the ERSIC Policy has liability limits of \$3 million for each claim or
27 related claims and \$3 million in the aggregate. Except as admitted, Westchester denies each and
28 every allegation in ¶15.

1 16. Westchester admits that United States Fire Insurance Company ("U.S. Fire") issued
2 to plaintiffs annual umbrella liability insurance policies for the stated policy periods. Westchester
3 further admits, on information and belief, that the U.S. Fire umbrella insurance policies issued to
4 plaintiffs each has policy limits of \$25 million in excess of the retained limit for each occurrence
5 and in the aggregate. Except as admitted, Westchester denies each and every allegation in ¶16.

6 17. Westchester admits that it issued to plaintiffs' parent company an Excess Umbrella
7 Policy, Policy No. MEA-675648, for a policy period from February 1, 2001 to February 1, 2002
8 (the "Westchester Fire Excess Policy"). The Westchester Fire Excess Policy is excess to, and
9 follows form in part to, the Markel American Policy. The Westchester Fire Excess Policy has
10 liability limits of \$10 million per occurrence and in the aggregate in excess of the Markel American
11 Policy. Westchester further admits that it issued to plaintiffs' parent company the following
12 commercial umbrella policies: Policy No. CUA-150963 for the policy period from February 1, 2002
13 to February 1, 2003; Policy No. CUA-706488 for the policy period from February 1, 2003 to
14 February 1, 2004; Policy No. CUW-774410 for the policy period from February 1, 2004 to
15 February 1, 2005; and Policy No. CUW-785695 for the policy period from February 1, 2005 to
16 February 1, 2006 (collectively the "Westchester Fire Umbrella Policies"). Each of the Westchester
17 Fire Umbrella Policies has liability limits of \$25 million in excess of the retained limit per
18 occurrence and in the aggregate. Except as admitted, Westchester denies each and every allegation
19 in ¶ 17.

20 18. Westchester admits, on information and belief, that in 2004 plaintiffs brought the
21 referenced action against Liberty Mutual and ERSIC concerning coverage for the Snow action.
22 Except as admitted, Westchester denies each and every allegation in ¶ 18.

23 19. Westchester admits on information and belief that in plaintiffs' previous coverage
24 action against Liberty Mutual and ERSIC, the court entered an order finding Liberty Mutual and
25 ERSIC had a duty to defend the Snow action. The contents of the order speaks for itself and the
26 court is referred to the order for its contents. Westchester denies any allegations in ¶19 which are
27 contrary to the contents of the order. Except as admitted, Westchester denies each and every
28 allegation in ¶ 19.

1 20. Westchester lacks sufficient information to admit or deny the allegations in ¶20 of
2 the Cross-Complaint and therefore denies same.

3 21. Westchester admits that the orders in the prior coverage action have been appealed
4 by Liberty Mutual to the Ninth Circuit Court of Appeal. Westchester lacks sufficient information to
5 admit or deny the remaining allegations in ¶21 of the Cross-Complaint and therefore denies same.

6 **First Claim for Relief**
7 **Declaratory Judgment re Defendants' Duty to Indemnify**

8 22. With regard to the allegations contained in paragraph "22" of the Cross-Complaint,
9 Westchester repeats its answers to paragraphs "1" through "21", inclusive, with the same force and
10 effect as if set forth fully at length herein.

11 23. Westchester admits, on information and belief, that there is a justiciable controversy
12 between cross-complainants, plaintiffs and cross-defendants as to the insurance carriers' duty to
13 indemnify plaintiffs with regard to the claims of the Snow action. Westchester objects to any
14 violation of the mediation privilege under California law including any allegations regarding
15 mediation discussions. Except as admitted, Westchester denies each and every allegation in ¶23.

16 24. Westchester objects to any violation of the mediation privilege under California law
17 including any allegations regarding mediation discussions. Without waiving this objection,
18 Westchester lacks sufficient information to admit or deny the allegations in ¶24 of the Cross-
19 Complaint and therefore denies same

20 25. Westchester objects to any violation of the mediation privilege under California law
21 including any allegations regarding mediation discussions. Without waiving this objection,
22 Westchester lacks sufficient information to admit or deny the allegations in ¶25 of the Cross-
23 Complaint and therefore denies same.

24 26. Westchester objects to any violation of the mediation privilege under California law
25 including any allegations regarding mediation discussions and/or mediation progress. Without
26 waiving this objection, Westchester responds to ¶26 by stating that it denies that its excess and/or
27 umbrella policies' respective coverage has been triggered by exhaustion of applicable underlying
28 insurance coverage and further admits that it has raised applicable coverage defenses with regard to

1 potential indemnity coverage for the claims in the Snow action. Westchester further admits that
2 U.S. Fire has filed a declaratory relief action in the state court in New York asserting that its
3 umbrella policies do not cover the claims in the Snow Action and/or that the policy limits of
4 applicable underlying primary insurance have not been exhausted according to the terms of such
5 policies. Westchester lacks sufficient information to admit or deny the remaining allegations in ¶26
6 of the Cross-Complaint and therefore denies same.

7 27. Westchester denies that cross-complainants are entitled to the declarations or other
8 relief alleged in ¶27, or any other relief as against this answering defendant. Westchester lacks
9 sufficient information to admit or deny the remaining allegations in ¶27 of the Cross-Complaint
10 and therefore denies same.

11 28. Westchester admits the allegation in ¶28.

12 29. As to the prayer for relief sought at page 5, line 19 - page 6, line 1 of the Cross-
13 Complaint, Westchester denies that Cross-Complainants are entitled to the declarations or other
14 relief sought in the prayer, or any other relief as against this answering defendant.

15 **FIRST AFFIRMATIVE DEFENSE**

16 30. The Cross-Complaint fails to state a claim against Westchester upon which relief can
17 be granted.

18 **SECOND AFFIRMATIVE DEFENSE**

19 31. The Cross-Complaint is barred, in whole or in part, due to the failure of plaintiffs
20 Lenscrafters, Inc. and EyeExam of California, Inc. to comply with express conditions in the
21 Westchester policies, including but not limited to the failure to comply with the warranty of
22 maintenance of scheduled underlying liability insurance coverage (Condition M) and/or the failure
23 to provide prompt notice of an "occurrence" or suit (Condition E).

24 **THIRD AFFIRMATIVE DEFENSE**

25 32. The Cross-Complaint is barred, in whole or in part, to the extent the claims in the
26 Snow action do not constitute claims for "damages" for "bodily injury," "property damage,"
27 "advertising injury" and/or "personal injury," as those terms are used or contained in some or all of
28 the Westchester policies.

FOURTH AFFIRMATIVE DEFENSE

33. The Cross-Complaint is barred, in whole or in part, to the extent the claims in the Snow action do not assert an "occurrence" as that term is defined in the respective Westchester policies.

FIFTH AFFIRMATIVE DEFENSE

34. The Cross-Complaint is barred, in whole or in part, to the extent the claims in the Snow action assert an offence, included within the definition of "personal injury," which did not occur during the respective policy periods for the Westchester policies.

SIXTH AFFIRMATIVE DEFENSE

35. The Cross-Complaint is barred, in whole or in part, in that there has not been exhaustion of underlying insurance policy limits and other applicable insurance and/or applicable self-insured retentions.

SEVENTH AFFIRMATIVE DEFENSE

36. The Cross-Complaint is barred, in whole or in part, by virtue of the application of one or more of the endorsements and/or exclusions in the Westchester policies.

EIGHTH AFFIRMATIVE DEFENSE

37. The Cross-Complaint is barred, in whole or in part, in that Westchester is excess to applicable liability insurance by virtue of the "Other Insurance" condition in the Westchester policies (Condition H).

NINTH AFFIRMATIVE DEFENSE

38. The Cross-Complaint is barred, in whole or in part, to the extent the claims in the Snow Action include intentional conduct and/or assert injury expected or intended by plaintiffs herein.

TENTH AFFIRMATIVE DEFENSE

39. The Cross-Complaint is barred, in whole or in part, to the extent the damage, injury or loss was known prior to the inception of the respective Westchester policies, per the "Known Injury or Damage Endorsement" contained in each of the policies.

///

ELEVENTH AFFIRMATIVE DEFENSE

40. The Cross-Complaint is barred, in whole or in part, to the extent the claims in the Snow Action include claims for exemplary or punitive damages, fines and/or penalties.

TWELFTH AFFIRMATIVE DEFENSE


41. Westchester reserves the right to assert additional defenses which cannot now be articulated due to cross-complainants' failure to particularize their claim and/or the lack of discovery on the issues in the Cross-Complaint.

WHEREFORE, cross-defendant Westchester Fire Insurance Company seeks judgment as follows:

1. Judgment dismissing the Cross-Complaint;
2. Judgment in Westchester's favor on its affirmative defenses;
3. Judgment that the coverage in Westchester's policy is not triggered with regard to the Snow Action and the claims therein; and,
4. For such other and further relief as the Court may deem just and appropriate.

DATED: August 22, 2007

HARRIS, GREEN & DENNISON
A Professional Corporation

By: 
ROBERT D. DENNISON
Attorneys for Cross-Defendant
WESTCHESTER FIRE INSURANCE COMPANY

DEMAND FOR JURY TRIAL

Defendant Westchester Fire Insurance Company hereby demands trial by jury as allowed by Rule 38 of the Federal Rules of Civil Procedure.

DATED: August 22, 2007

HARRIS, GREEN & DENNISON
A Professional Corporation

By: 

ROBERT D. DENNISON
Attorneys for Defendant,
WESTCHESTER FIRE INSURANCE COMPANY

PROOF OF SERVICE

I, TAMARA A. CARBONE, am employed in the aforesaid county, State of California: I am over the age of 18 years and not a party to the within action: my business address is 5959 West Century Boulevard, Suite 1100, Los Angeles, California 90045.

On August 22, 2007, I served the following document described as:

ANSWER OF WESTCHESTER FIRE INSURANCE COMPANY TO CROSS-COMPLAINT OF MARKEL AMERICAN INSURANCE COMPANY

DEMAND FOR JURY TRIAL

VIA THE UNITED STATES DISTRICT COURT ELECTRONIC FILING SERVICE
on interested parties in this action set forth below:

Richard DeNatale, Esq. Celia M. Jackson, Esq. Heller Ehrman LLP 333 Bush Street San Francisco, CA 94104-2878 Tel.: (415) 772-6000 Fax: (415) 772-6268 Email: richard.denatale@hellerehrman.com celia.jackson@hellerehrman.com	Attorneys for Plaintiffs, Lenscrafters, Inc., Eyexam of California, Inc.
--	---

Terrence R. McInnis, Esq. Ross, Dixon & Bell, LLP 5 Park Plaza, Suite 1200 Irvine, CA 92614 Tel.: (949) 622-2700 Fax: (949) 622-2739 Email: tmcinnis@rdbl原因.com	Attorneys for Defendant, Executive Risk Specialty Insurance Company
--	--

Alex F. Stuart, Esq. Willoughby, Stuart & Bening Fairmont Plaza 50 West San Fernando, Suite 400 San Jose, CA 95113 Tel.: (408) 289-1972 Fax: (408) 295-6375 Email: afs@wsblaw.net	Attorneys for Defendant, Liberty Mutual Insurance Company
---	--

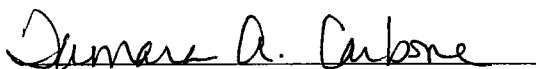
Mark Craig Goodman, Esq.
 Amy Rose, Esq.
 Squire, Sanders & Dempsey, L.L.P.
 One Maritime Plaza, Suite 300
 San Francisco, CA 94111-3492
 Tel.: (415) 954-0289 Fax: (415) 393-9887
 Email: mgoodman@ssd.com
 arose@ssd.com

Attorneys for Defendant,
 United States Fire Insurance Company

Chip Cox, Esq.
 Attorney at Law
 465 California Street, Suite 500
 San Francisco, CA 94104
 Tel.: (415) 397-2222 Fax: (415) 397-6392
 Email: chipc@longlevit.com

Attorney for Defendant,
 Markel American Insurance Company

Executed on August 22, 2007, at Los Angeles, California. I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


 TAMARA A. CARBONE